

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
LARRY D. VAUGHT, JUDGE

DIVISION III

E07-230

March 5, 2008

PATRICIA E. SCOTT

APPELLANT

V.

DIRECTOR, DEPARTMENT OF  
WORKFORCE SERVICES and  
HAYNES SPORTS THERAPY &  
REHAB

APPEAL FROM THE ARKANSAS  
BOARD OF REVIEW  
[2007-BR-01265]

APPELLEES

REVERSED and REMANDED

In this unbriefed unemployment-compensation case, appellant Patricia Scott appeals from the decision of the Arkansas Board of Review disqualifying her from receiving unemployment-compensation benefits based on a finding that she was discharged for misconduct connected with the work. The issue before us is whether the Board's decision is supported by substantial evidence. We hold that it is not, and we reverse and remand for an award of unemployment benefits.

Scott worked for appellee Haynes Sports Therapy & Rehab as a personal trainer. On June 7, 2007, she was involved in a physical altercation with a co-worker. Subsequently, on June 19, 2007, she received a letter from her employer noting that after "reviewing all of the reports and conducting interviews" a conclusion was reached that "all parties involved acted inappropriately and harmful [sic] to the company." The letter went on to note that provisions

of the company's policy and procedure manual had been violated because "[t]here was physical contact by both parties involved." And as such, both employees involved in the altercation were terminated.

A hearing was conducted before the Arkansas Appeal Tribunal on August 8, 2007. The Tribunal noted that both Scott and a witness to the event, Morris Stiles (a gym patron), testified that a male co-worker, later identified as nineteen-year-old Jermaine Rudd, pushed Scott as she attempted to enter the building. The Tribunal also found that the "employer presented no first-hand testimony concerning the incident." As such, the Tribunal concluded that the evidence was "insufficient" to show that Scott was the aggressor and that the employer failed to show that Scott was discharged for misconduct in connection with the work.

The decision of the Tribunal was appealed to the Board of Review. In its opinion, the Board recounted much of the testimony from the employer's sole witness, Robin Smith, who was not present during the altercation. Smith's testimony was largely based on an incident report and internal investigation that followed the altercation. Without explanation, after making blow-by-blow factual findings surrounding the physical altercation between Rudd and Scott, the Board concluded that Scott:

... left the work place without permission. While she asserted that it was common practice for employees to leave the work place to pick up dinner, the employer representative [Smith] disputed that assertion. Additionally, [Scott's] assertion is damaged by the fact that the employer maintained that the nineteen-year-old employee called the owner seeking instructions concerning how to proceed as [Scott] left the work place without explaining her intentions,

and that he, the nineteen-year-old employee, did not know if he should close the business for the night.

The Board went on to conclude that Scott's alleged unauthorized departure constituted misconduct and, therefore, reversed the Tribunal's award of benefits. Scott appeals this decision, noting that her termination and the initial Tribunal determination centered on the workplace altercation, yet the Board's determination that she committed misconduct was based on its finding that she left the workplace without permission.

In unemployment-compensation cases, findings of fact by the Board are conclusive if supported by substantial evidence, and review by this court is limited to determining whether the Board could reasonably reach its decision upon the evidence before it. *Hiner v. Director*, 61 Ark. App. 139, 965 S.W.2d 785 (1998). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Rollins v. Director*, 58 Ark. App. 58, 945 S.W.2d 410 (1997). We review the evidence and all reasonable inferences deducible therefrom in a light most favorable to the Board's findings. *Barber v. Director*, 67 Ark. App. 20, 992 S.W.2d 159 (1999). We do not conduct a de novo review of the evidence in an appeal from a Board decision. *Hiner, supra*. Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Niece v. Director*, 67 Ark. App. 109, 992 S.W.2d 169 (1999). An administrative agency, like a jury, is free to believe or disbelieve any witness, and we give the evidence its

strongest probative force to support the administrative decision. *Singleton v. Smith*, 289 Ark. 577, 715 S.W.2d 437 (1986).

In this case, Scott was terminated after the fistcuffs with Rudd, her fellow worker. Rudd was also terminated based on his involvement in the tussle. Stiles, the gym patron who came to Scott's defense, also exchanged blows with Rudd and as a result had his gym membership terminated. Both Scott and Stiles testified that Rudd was the aggressor. Smith, the only employer's representative testifying in the matter, admitted that she was not a witness to the altercation. Further, the termination letter that Scott received addressed only the workplace altercation and made no mention of the alleged unauthorized dinner break.

Contrary to the Board's findings, Smith was not asked and did not comment on whether dinner breaks were authorized by the employer. Indeed, the propriety—or lack thereof—of Scott's "dinner break" was not developed at the hearing at all. Yet, the Board found it to be the sole basis for her misconduct. This conclusion ignores the fact that Scott was terminated for engaging in physical contact with a coworker, and the employer failed to carry its burden of showing that Scott's participation in the tussle amounted to workplace misconduct. In fact, each of the first-hand accounts of the altercation presented at the hearing (including the testimony from a third-party witness) recited that Rudd, not Scott was the aggressor. As such, because the decision of the Board is not supported by substantial evidence, we reverse and remand for an award of benefits.

Reversed and remanded.

GRIFFEN and BAKER, JJ., agree.

